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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 461

MICHAEL GLENN, a minor, by and through his Guardian Ad Litem, IDA MAE GLENN,
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of California (R. 58-71) is reported at 129 F. Supp. 914. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 2-7) is reported at 231 F. 2d 884.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1956 (R. 92) and a petition for rehearing was denied on May 25, 1956 (R. 93). On August 23, 1956, the time within which to file a petition for a writ of certiorari was extended to October 8, 1956, by order of Mr. Justice Burton. The petition for a writ of certiorari was filed on September 28, 1956. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the two year time limitation on Tort Claims Act suits contained in 28 U.S.C. 2401(b) is tolled by the disability provisions of 28 U.S.C. 2401(a).

STATUTE INVOLVED

28 U.S.C. 2401 provides as follows in pertinent part: *Time for commencing action against United States.*

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
>
> (b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, * * *.

82 U.S.C. 1346 is reprinted in the Appendix, *infra*, pp. 17-18.

STATEMENT

On November 12, 1953, Michael Glenn, petitioner here, acting through his mother and guardian, Ida Mae Glenn, instituted this tort action against the Government in the United States District Court for the Southern District of California, Central Division (R. 3-8). The complaint, as amended, alleged the following:

Plaintiff was born at the United States Naval Air Station Hospital, Seattle, Washington, on December 5, 1949 (R. 4). Previously, the Government, together with its employees at the hospital, had undertaken the prospective delivery of the child and, pursuant to that undertaking, said employees attended the child's birth (R. 4-5).[1] The complaint went on to allege negligence on the part of the Government personnel in prematurely and carelessly using clamps and forceps during the delivery of the child and dropping him to the floor immediately after birth (R. 5-8). As a consequence of these alleged actions, the complaint stated that plaintiff was injured in that he sustained "numerous bruises, abrasions, contusions, and lacerations over and about his head and body, a cerebral involvement, a spastic involvement, cerebral palsy, Little's disease, together with a severe and profound physical and mental shock to his entire nervous system" and that impairment of his faculties and his disabilities were of a permanent nature (R. 5-6). As compensation for the aforementioned injuries, the complaint sought $750,000 in gen-

[1] Mrs. Glenn was the wife of a member of the Armed Forces and therefore qualified for care in a Government hospital.

eral damages plus an amount in special damages, to be computed at the time of trial, which by then might have accrued (R. 8).

On May 6, 1954, the Government answered,[2] denying the allegations of the complaint that there was carelessness or negligence upon its part or on the part of its employees during or after delivery, and denying that the plaintiff had been dropped (R. 23-28). The answer also asserted that the claim was barred by 28 U.S.C. 2401(b) since suit was not instituted within two years after the claim accrued (R. 27).

Subsequent to a pretrial conference, the parties stipulated that the issues for trial were as follows: The alleged negligence of Government medical personnel during and after delivery; whether the child was dropped; whether the alleged negligence caused the injuries complained of; and, the nature, extent and duration of plaintiff's injuries (R. 35-37). Thereafter, an additional stipulation was entered into by the parties and approved by the court, whereby the Government, while still denying negligence or liability on its part, agreed to a partial compromise of the action in order to avoid a lengthy and costly trial on the above issues. (R. 52-57). The stipulation provided that if the court decided that a cause of action was stated in the complaint and that such cause of action was not time barred by 28 U.S.C. 2401(b), judgment might be entered in favor of the plaintiff for $7,500 (R. 55-56). The stipu-

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[2] The District Court had previously denied a motion by the Government to dismiss the complaint on the ground that the action was time barred by the two-year limitation on Tort Claims Act suits contained in 28 U.S.C. 2401(b) (R. 10, 12-13).

lation expressly reserved the appellate rights of either party on the limitations question (R. 56).

On April 19, 1955, the district court, pursuant to a memorandum of decision (R. 58-71), entered judgment for the plaintiff (R. 75-76). The court held that this action was not barred by the two-year limitation on Tort Claims Act suits found in 28 U.S.C. 2401(b), in view of the minority and consequent legal disability of the plaintiff (R. 74). It ruled that plaintiff was covered by the disability provision contained in 28 U.S.C. 2401(a) (*supra,* p. 2), which entitles an individual coming within its purview to three years after the cessation of a disability to institute suit (R. 74). The court reasoned that notwithstanding the independent statutory derivations of 28 U.S.C. 2401(a) and 28 U.S.C. 2401(b), *supra,* p. 2, the 1948 revision and codification of those provisions in the present Judicial Code made the disability provision of Section 2401(a) applicable to the limitations period specified in Section 2401(b) (R. 62-69). Judgment was accordingly entered for the plaintiff in the amount of $7,500 (R. 76).

On appeal, the Court of Appeals for the Ninth Circuit, in a divided decision, reversed (Pet. App. 2-7). The court commented initially that if it were restricted to reading 28 U.S.C. 2401 alone "that it is clear, due to arrangement of everything within the section, that there is no license to carry the tolling sentence in (a) out of (a) over into (b)" (Pet. App. 4). The court then went on to examine the legislative history of 28 U.S.C. 2401, as part of the revised Judicial Code adopted by Congress in 1948 (Pet. App. 4).

Section 2401(a) is derived from the Tucker Act which permitted certain non-tort suits against the Government and contained a disability provision. Section 2401(b), the court indicated, is derived from the Tort Claims Act which contained its own time limitations and did not include a provision tolling that limitation for disability (Pet. App. 5).

The court stated that it could not presume that by a revision which took two separate limitation clauses out of their respective contexts, "rewords them a little and sets them down with separate sub-lettering in a separate limitations section, that the whole of the two were intended to be commingled" (Pet. App. 5). Nothing in the legislative history of the 1948 codification warranted such a commingling and the Reviser's notes which purported to list changes effected by the Code did not signify any purpose to have the Tucker Act disability provision apply to Tort Claims Act suits. (Pet. App. 5.) The court concluded that 2401(a) and (b) were primarily a codification of existing law and that any changes are within the subsections themselves, which are mutually exclusive (Pet. App. 5).

The dissenting judge (Judge Stephens) stated that it was his opinion that, although tort actions against the Government were dealt with separately in 28 U.S.C. 2401(b), the disability provision of 2401(a) should nevertheless be read as applying to such suits (Pet. App. 6-7).

ARGUMENT

1. 28 U.S.C. 2401 contains the limitations provisions of two separate statutes. *Supra,* p. 2. Subsection (a),

in which the disputed disability provision is found, is derived from Section 24 (20) of the Judiciary Act of March 3, 1911, 36 Stat. 1093, which, based on Section 2 of the 1887 Tucker Act, 24 Stat. 505, gave the District Courts concurrent jurisdiction with the Court of Claims in certain non-tort civil actions against the Government. 28 U.S.C. (1946 Ed.) 41 (20). The 1911 Act set a six-year limitation for institution of such suits but provided that in the event of certain enumerated disabilities that period would be extended until three years after the disability had ceased. 28 U.S.C. (1946 Ed.) 41 (20).

28 U.S.C. 2401(b), in turn, is derived from Section 420 of the 1946 Federal Tort Claims Act (60 Stat. 842) which set forth the time limitations on tort actions against the United States under that Act. 28 U.S.C. (1946 Ed.) 942. That section set a one-year limit on such actions (subsequently extended to two years by the Act of April 25, 1949, 63 Stat. 62) but made no provision for a tolling of the limitations period by virtue of any disability.

In 1948, with the enactment of the present Judicial Code, 62 Stat. 869 *et seq.*, the provisions of the 1911 version of the Tucker Act and the provisions of the Tort Claims Act which authorized the District Courts to entertain suits against the United States in their respective categories were grouped together as subsections of Section 1346 of Title 28 and denominated "United States as defendant". See Appendix, *infra*, pp. 17-18. The limitations provisions of these two acts were also grouped together as subsections of Section 2401 of Title 28 and labeled "Time for commencing

action against United States" (*supra*, p. 2). Until the decision of the District Court in the present case, all suggestion of an interdependence of the disparate limitations of 2401(a) and (b) had been rejected by the courts which have held that the disability provision contained in 28 U.S.C. 2401(a) is inapplicable to toll the limitation on tort actions found in 28 U.S.C. 2401(b). *Whalen* v. *United States*, 107 F. Supp. 112 (E.D. Pa.); *Foote, et al* v. *Public Housing Commissioner of the United States*, 107 F. Supp. 270 (W.D. Mich.); *Brereton* v. *United States*, Civil No. 890, S.D. South Dakota, decided February 17, 1955 (not reported).

In our view, the foregoing decisions and the ruling of the Ninth Circuit now before this Court embody the correct construction of 28 U.S.C. 2401. Palpably, the fact that the two different limitation provisions of the Tucker Act and the Tort Claims Act were grouped together, for convenience, as different parts of one section of the 1948 Code did not manifest a Congressional purpose that the disability provision of the former was now to apply to tort claims litigation. Mere separation of portions of old statutes and regrouping them for convenience in code form does not effect a change in the law. *Buck Stove Co.* v. *Vickers*, 226 U.S. 205, 213; *Hyde* v. *United States*, 225 U.S. 347, 361. Nor is the law varied by alterations in phraseology where such modifications are intended merely to restate pre-existing law in different terms or in a simplified form. See *United States* v. *Lacher*, 134 U.S. 624, 626; *Holmgren* v. *United States*, 217 U.S. 509, 519-520; *Anderson* v. *Pacific Coast S.S. Co.*, 225

U.S. 187, 199, 202-203; cf. *United States* v. *Grainger,* 346 U.S. 235, 247-248. The structure and terms of 28 U.S.C. 2401, as well as the Reviser's comments on the general scope of the 1948 revision, show that we are dealing with changes of that sort in this case.

2. 28 U.S.C. 2401, as indicated, follows the pattern set by 28 U.S.C. 1346 (*infra,* pp. 17-18)—granting jurisdiction to the District Courts to hear suits against the United States—in that it collocates parallel provisions of the 1911 form of the Tucker Act and of the Tort Claims Act as separate subsections of a common section with a convenient reference denominator. The pre-existing independence of those provisions is preserved. This is attested to by numerous factors, not the least of which is the utilization of separate subsections, each dealing with different categories of actions and each setting up different time limitations. This separateness is underscored by the language of Section 2401(b) which states boldly and without any reference to Section 2401(a), with its six-year time limitation and its three-year disability provisions, that "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *" (*supra,* p. 2).

As pointed out by the Court of Appeals (Pet. App. 5), there is nothing in the legislative history of this portion of the codification which even suggests that the disability provision of Section 2401(a) was designed to apply to Section 2401(b). Nor is there any indication of such applicability in the exhaustive Reviser's Notes. Indeed, those notes emphasize the mutual exclusiveness of the subsections, stating that Sec-

tion 2401(a) relates to the "time limitation for bringing actions against the United States under section 1346(a) of this title", which explicitly excludes tort actions (*infra*, p. 17), and that "Subsection (b) of the revised section simplifies and restates said section 942 [limiting tort actions against the Government in the former 28 U.S.C.] *without change of substance*" (emphasis added). See Report No. 308, House Committee on Judiciary, 80th Congress, 1st Sess., p. A. 185.[3]

Petitioner relies heavily upon the fact that the disability provision of the 1911 Act was revised in Section 2401(a) of the 1948 codification to open with the phrase "[t]he action of any person under legal disability" and makes that linguistic change a prime basis for urging that Section 2401(a) be accorded general applicability. Apart from the fact that the structure of

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[3] In the *Judicial Code—1948 Revision*, 8 F.R.D. 439, William W. Barron, the Chief Reviser of Title 28, relates (8 F.R.D. at 441):

> There was no purpose on the part of the Revision staff to effect any change in existing law. Despite this, the process of comprehensively examining and rewriting the Code disclosed some grave disparities, inconsistencies and ambiguities not correctable by mere codification * * *. The Reviser and the Advisory Committee, upon discovering situations which would not yield to codification, felt in duty bound to apprise Congress of their findings and recommendations. Consequently a few such changes, substantive in nature, were recommended to Congress. These were carefully outlined in the Reviser's Notes, and fully considered by the Judiciary Committees of both houses * * *.

Thereafter, the article goes on to discuss the nature of those substantive changes. No mention is made of any such changes effected by 28 U.S.C. 2401. See also *ibid.* at pp. 445-446.

Section 2401, as well as the particular language of Section 2401(b), bely such applicability, the language of the provision prior to 1948, read in the light of the authoritative Reviser's commentaries on the 1948 version, makes it clear that those prefatory words were not intended to have the overriding effect ascribed by petitioner. Rather, they related, in a revised and simplified form, solely to the preceding sentence of Section 2401(a) which sets limitations on District Court Tucker Act suits. Thus, the Reviser's note following 28 U.S.C. 2501, to which we are referred by Section 2401, and upon which petitioner relies (Pet. 9), states that this phrase was:

> * * * substituted for "married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued; entitled to the claim." The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use *of the general language substituted.* [Emphasis added]

It is apparent that "the general language substituted" was not intended to extend the scope of the disability provision of Section 2401(a) beyond those non-tort causes of action previously covered in Section 24 (20) of the 1911 Act and now covered by 28 U.S.C. 1346(a), *infra,* p. 17. Rather, as applied in Tucker Act suits, the new general phrase was designed to obviate reference to specific disabilities, and to

bring the disability provision into tune with what modern law considers to be a disabling legal status.

It is significant, moreover, that the disability provision of Section 2401(a) permits a three-year period for actions after cessation of the disability. This is less than the six-year period for institution of suits allowed by this subsection to persons under no disability. However, this three-year period is *greater* than the two-year period allowed for institution of tort suits by Section 2401(b), and indeed when Section 2401(b) first became law only one year was permitted for institution of tort claims. 60 Stat. 842. Thus, if the disability provision of Section 2401(a) were to be applied to Section 2401(b), we would have the anomolous situation of a tort claimant having a longer period of time to institute suit *after* his disability was removed than he would have had if he had not been under a disability. Such a result would be unique in the limitations field and flies in the face of the rationale of disability exceptions to statutes of limitations.[4]

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[4] Nor does the relative placement of the subsections of 28 U.S.C. 2401 indicate the creation of such a situation. If the disability provision of Section 2401(a) were intended to apply to 2401(b), the logical method would not have been to place it in 2401(a) without any reference to tort actions, as was done here, but rather to place it either at the end of Section 2401(b) with a reference to both subsections, or in a separate subsection following both Sections 2401(a) and (b). The latter technique, it should be noted, was precisely the one followed by Congress in providing that the set-off and counterclaim provision of the 1911 Act was to apply both to Tucker Act suits under 28 U.S.C. 1346(a) and to Tort Claims Act suits under 28 U.S.C. 1346(b). See 28 U.S.C. 1346 (c), *infra*, p. 18.

3. It is significant, we believe, that in every other statute dealing with Governmental or private tort liability, and the time limitations thereon, Congress has not seen fit to include a disability provision. Neither the Suits in Admiralty Act, 47 Stat. 420, 46 U.S.C. 745; the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 782; the Jones Act, 41 Stat. 1007, 46 U.S.C. 688; the Carriage of Goods by Sea Act, 49 Stat. 1207, 1208; nor even the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. 56, contain disability provisions. Moreover, the courts have rejected attempts judicially to engraft those acts with disability extensions. See *Sgambati* v. *United States,* 172 F. 2d 297 (C.A. 2), certiorari denied, 337 U.S. 938; *Williams, et al.* v. *United States, et al.,* 228 F. 2d 129 (C.A. 4), certiorari denied, 351 U.S. 986; *Kalil* v. *United States,* 107 F. Supp. 966, 967 (E.D. N.Y.); *Wahlgren* v. *Standard Oil Co. of N. J.,* 42 F. Supp. 992, 993 (S.D. N.Y.).[5]

Two courts have recognized narrow exceptions. In *Osbourne* v. *United States,* 164 F. 2d 767, the Second Circuit held that there is one exception to the

[5] The foregoing cases all deal with actions brought under the Suits in Admiralty Act, Public Vessels Act, or Jones Act. The following cases, construing the limitations provisions of the Federal Employers Liability Act, have denied disability extensions for any reason. *Damiano* v. *Penn. R. Co.,* 161 F. 2d 534 (C.A. 3), certiorari denied, 332 U.S. 762; *Bell* v. *Wabash Ry. Co.,* 58 F. 2d 569 (C.A. 8); *Frabutt* v. *New York, C. & St. L. R. Co.,* 84 F. Supp. 460 (W.D. Pa.); *Alvarado* v. *Southern Pac. Co.* (Tex. Civ. App.) 193 S.W. 1108; *Jordan* v. *Baltimore and Ohio R. Co.,* 135 W. Va. 183, 62 S.E. 2d 806; *Wichita Falls & S.R. Co.* v. *Durham,* 132 Tex. 143, 120 S.W. 2d 803; *Wade* v. *Franklin,* 51 Ohio App. 318, 200 N.E. 644; *Gauthier* v. *Atchison, T. & S. F. Ry. Co.,* 176 Wis. 245, 186 N.W. 619; *Bement* v. *Grand Rapids & Ind. Ry. Co.,* 194 Mich. 64, 160 N.W. 424.

rule that, in the absence of a specific disability provision, the limitation period in these statutes will not be tolled, and that is where there is physical impossibility of access to the courts such as might happen in wartime to foreigners, enemy aliens, or our own personnel who are prisoners of war. 164 F. 2d 767, 768-769. However, *Osbourne* recognized that no such disability extensions can be judicially created for infancy. 164 F. 2d 767, 768. In *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253, certiorari denied, 339 U.S. 919, the Fourth Circuit held, in a suit under the F.E.L.A., that the limitations period would be tolled because the defendant fraudulently induced plaintiff not to sue.

Petitioner, relying principally upon *Scarborough*, asserts that disability exceptions should be read into the Tort Claims Act. Putting to one side the question of whether *Osbourne* and *Scarborough* were correctly decided,[6] the Fourth Circuit itself, in a recent decision, has indicated where it will draw the line in these cases. In *Williams, et al.* v. *United States, et al.*, 228 F. 2d 129 (C.A. 4), certiorari denied, 351 U.S. 986, that court was faced with the contention that insanity tolled the two-year limitation of the Suits in Admiralty Act. In affirming the District Court's rejection of that proposition (133 F. Supp. 317), the Fourth Circuit stated (228 F. 2d at 132):

> * * * The statute contains no saving clauses for disability of any kind. *Sgambati* v. *United States*, 172 F. 2d 297, certiorari denied 337 U.S. 938 * * *.

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[6] The Fourth Circuit recognized that its decision in *Scarborough* was against the weight of authority. 178 F. 2d 257-258.

> Two exceptions to the rigid prevailing rule, that such statutes of limitations cannot be extended under any circumstances, have been carved out by our courts; in the prisoner of war situation, *Osbourne* v. *United States,* 2 Cir., 164 F. 2d 767; and in the fraud situation, *Scarborough* v. *Atlantic Coast Line R. Co.,* 4 Cir., 178 F. 2d 253 * * * certiorari denied 339 U.S. 919 * * *. We are unimpressed with the argument that insanity likewise should toll this Statute of Limitations and we expressly hold that it does not. See, to like effect, *Kalil* v. *United States,* D.C., 107 F. Supp. 966, and also Judge Bryan's reasoning, 133 F. Supp. 318-319.[7]

Accordingly, no sound basis exists for departing from previously established law. In the absence of an express disability provision, limitations on Tort Claims Act suits against the Government may not be tolled for infancy.[8]

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[7] The District Court's opinion in *Williams* (133 F. Supp. 317) makes the following observation (at p. 319):

> * * * An additional factor active here, but not present in the *Scarborough* case, is the immunity of the United States to suit. It holds the claimant to strict compliance with the very terms of the exceptive statute. The rigidity of the immunity is relaxed during the two years only. Indulgences for infancy or insanity are not a matter of right; nor does their absence invalidate the statute. *Vance* v. *Vance,* 1883, 108 U.S. 514, 521 * * *. Congress advisedly grants or withholds these tolerances. As witness: Additional time for these contingencies is not accorded by the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, but it is allowed plaintiffs in the Court of Claims. 28 U.S.C. §§ 2404, 2501.

[8] Petitioner attempts to characterize the limitations in the Tort Claims Act as procedural rather than substantive and argues therefrom that being procedural they are subject to implied ex-

CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari be denied.

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OCTOBER 1956

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ceptions (Pet. 11-17). Whatever validity this argument may have in other areas, the limitations of the Tort Claims Act are clearly jurisdictional and accordingly are not subject to implied exceptions, extensions, or waivers. *Anderegg* v. *United States*, 171 F. 2d 127, 128 (C.A. 4), certiorari denied, 336 U.S. 967. See also *Munro* v. *United States*, 303 U.S. 36, 41; *Finn* v. *United States*, 123 U.S. 227.

APPENDIX

28 U.S.C. 1346 provides:

§ 1346. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws * * *;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the

claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

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